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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1266

A. C. PARK,

Petitioner,

versus

H. T. (TOMMY) HUFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPORTS OF OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals, for the Fifth Circuit en banc, to which this petition is being brought, has not yet been officially reported, but is included in Appendix A. The judgment is included in Appendix B. The official opinion of the panel of the United States Court of Appeals for the Fifth Circuit to which the case was first assigned is reported in 493 Fed. 2d 923, and is included herein as Appendix C. The official opinions of the Georgia Supreme Court in this case are officially reported in 224 Ga. 467 (162 S.E. 2d 359) and 225 Ga. 618 (170 S.E. 2d 687). The opinion of the District Court, unreported, is hereto included as Appendix D.

STATEMENT OF GROUNDS OF JURISDICTION OF THIS COURT

(A).

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be herein reviewed was dated and entered on the 20th day of January, 1975, same having been rendered on a rehearing en banc from a panel opinion dated the 6th day of May, 1974.

(B).

The order granting a rehearing en banc was dated and entered on the 17th day of June, 1974.

(C).

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is under and by virtue of Title 28, U.S.C.A. §1254(1) authorizing cases in the Court by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment.

(D).

The time within which to apply for a writ of certiorari to bring judgment in a civil action, suit or proceeding before Supreme Court for reivew, is ninety (90) days after entry of such judgment pursuant to 28 U.S.C.A. §2101(c).

QUESTIONS PRESENTED FOR REVIEW

Whether the petitioner's Sixth Amendment right "to be confronted with the witnesses against him", as enforceable against the States under the "Due Process" clause of the Fourteenth Amendment, were violated by a State Court by allowing into evidence against him in a criminal case, and over his objection, pre-delicto out-of-court declarations of witnesses who were available to testify for the State, but who were not called, where such declarations were the sole evidence to connect the petitioner with the crime of murder charged against him, and where such declarations were both crucial and devastating.

CONSTITUTIONAL PROVISION INVOLVED

Amendment Six to United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment Fourteen to the United States Constitution provides in Section I as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Georgia as a Habeas Corpus petition brought by petitioner, A.C. Park, against H.T. (Tommy) Huff, Sheriff, pursuant to Title 28 U.S.C.A. §2254. The basis of federal jurisdiction in the Court of first instance was based on petitioner's detention under a judgment of a State Court on the ground that he was in custody in violation of the Constitution of the United States and that he had exhausted the remedies available in the courts of the State.

Petitioner was indicted, along with Douglas Pinion, George Worley, Lloyd Seay and John Blackwell, in December, 1967, by the Grand Jury of Jackson County, Georgia, for the murder of Floyd Hoard. Pinion and Worley were separately tried, found guilty, and sentenced to life imprisonment. Seay and Blackwell pleaded guilty and were sentenced to life imprisonment in exchange and pursuant to a recommendation

by the prosecuting attorney for their testimony against petitioner. Petitioner was tried and found guilty and sentenced to death.

On an appeal to the Georgia Supreme Court, the conviction of petitioner was reversed and a new trial ordered on a non-federal ground; to wit: that petitioner's counsel had been illegally denied the closing argument to the jury. *Park vs. State, 224 Ga. 467 (162 S.E. 2d 359).*

Petitioner was again tried in 1969 before a jury in Jackson County, was convicted and received the death penalty. On appeal to the Georgia Supreme Court, the conviction was affirmed. *Park vs. State, 225 Ga. 618 (170 S.E. 2d 687).* Certiorari was applied for to this court, and on June 29, 1972, this Court vacated the judgment insofar as it left undisturbed the death penalty imposed, *Park vs. Georgia, 408 U.S. 935 (92 S. Ct. 2845), 33 L.Ed. 2d 749,* and remanded as to penalty only. The Georgia Supreme Court, on remand, ordered the trial Court to impose a life sentence. *Park vs. State, 229 Ga. 731 (194 S.E. 2d 410).* Life sentence was imposed and petitioner then brought a petition for Writ of Habeas Corpus in the District Court.

The United States District Court for the Northern District of Georgia, Sidney O. Smith, Jr., Chief Judge, denied habeas relief in an unreported decision. (Appendix D). A panel of the United States Court of Appeals for the Fifth Circuit, in a 2 to 1 decision, reversed the District Court, holding petitioner's Sixth Amendment rights to have been violated by the State Court. (Appendix C) *Park vs. Huff, 493 F. 2d 923.* On

rehearing en banc, the judgment of the panel was reversed and the judgment of the District Court was affirmed, with six (6) judges of the Court of Appeals dissenting. (Appendix A & B). The petition for certiorari is being brought from this latter judgment.

FACTS OF CASE IN STATE COURT

The Solicitor General, Floyd Hoard the decedent, hereinafter referred to as Hoard, was the chief prosecuting officer of the Piedmont Judicial Circuit, and Jackson County was included in that area. Mr. Hoard was killed by a dynamite bomb that had been placed on the ignition of his car on August 7, 1967. Approximately four months later the defendant and Douglas Pinion, J.H. Blackwell, Lloyd George Seay and George Iris Worley, hereinafter referred to by their last names, were indicted by the Grand Jury of Jackson County for murder. Seay and Blackwell pleaded guilty upon recommendation by the State for life sentences, and Pinion and Worley were separately tried, found guilty, and sentenced to life imprisonment.

Seay, Blackwell and Worley purchased the dynamite and wired it to the car. Pinion hired and paid Seay to do the killing. Worley and Pinion did not testify. Blackwell pleaded the Fifth Amendment when sworn by the State, after giving his name and place of confinement. The State then offered the transcript of the former testimony of Blackwell on the previous trial which was allowed into evidence over objection by defense counsel on constitutional grounds. This transcript revealed that Blackwell, Seay and Worley

purchased the dynamite and wired it to the ignition of Mr. Hoard's car, and that Seay paid Blackwell $1,-500.00 for his participation in the murder. The transcript also revealed that Blackwell had been offered life imprisonment in exchange for his testimony. While under arrest and confined in jail in November 1967, Blackwell confessed to Sheriff Roland Attaway, two members of the Georgia Bureau of Investigation and the prosecuting attorneys after the jail doctor had given him some pills the same day. Blackwell later admitted that his confession was false. On the day of the confession Blackwell's girlfriend visited him in jail in a private room with a bath, two half beds, a couch and a chair for about thirty minutes. Prior to entering this room Blackwell had denied participation in the crime and refused to give a statement. Up to the time of confession, Attaway told Blackwell he probably would get the electric chair. Blackwell was promised a life sentence in return for his confession. This confession was admitted by Blackwell to have been false in at least eight different instances. A State agent testified that Blackwell denied any knowledge of the crime when he first talked to him about it and that Blackwell became nervous and upset and was taking medication. Blackwell did not give the confession until he was permitted to visit with his girlfriend.

Lloyd Seay, offered by the State, invoked the Fifth Amendment at which time the State introduced in evidence, over objections on constitutional grounds, the transcript of Seay's testimony on the former trial. The transcript revealed that Seay had previously testified that he had been told by Pinion that the "old

man", identified as the defendant, would not pay anymore money to have Hoard killed, and that after the murder Pinion told Seay that the "old man" was worried and wanted to know who had committed the murder, and that Worley had told Seay prior to the murder that if he didn't go through with the killing the "old man" would have something done to him and his family.

Sheriff Attaway arrested Seay in Johnson County and kept him there about ten days. Bond was set at $30,000.00 then reduced to $5,000.00. He was rearrested by Attaway just before Thanksgiving and transferred to six different jails. Attaway threatened to kill him, to turn him over to the Ku Klux Klan, and to put him in jail with Bill Powell. The transcript of Seay's testimony related that Attaway was trying to put pressure on him to get him to tell him something and that he was using dirty tactics. When Seay's lawyer left one of these jails Attaway put Seay in chains and carried him to Louisville. Attaway threatened to kill Seay. He stopped on the highway, took him out of the car and tried to get him to run telling him that he would like to kill him. Attaway threatened to raise Seay's bond to $60,000.00. He then told Seay that Blackwell had already signed a statement against him and if he didn't cooperate he would get the electric chair. Attaway threatened to prosecute Seay's wife, who was pregnant, for arson, operating a still and being an accessory to murder. Seay testified on his first trial that he signed a confession because of the threat of prosecution of his wife. Attaway promised Seay that if he confessed his wife would not be prosecuted and Seay admitted on the first trial that this promise was

one of the main inducements for him to give the statement. Seay's confession was given about 4 A.M. after he had been advised that Blackwell had signed a statement against him. Another agent of the State offered Seay $12,000.00 and complete immunity in return for his testimony.

The trial Court then permitted the State, over objection by counsel for the Appellant on constitutional grounds, to introduce the confessions given by Seay and Blackwell, although the State made no effort to dispute or deny the circumstances shown by the record as to the use of coercion in obtaining them. The confessions differed in one main respect. The confession of Seay revealed that Seay had been told by Pinion that the "old man" (contended by the State to refer to the defendant) would not go up anymore where the confession of Blackwell did not refer to or mention the Appellant either by name or designation. However, Blackwell's confession tended in many ways to offer corroboration of Seay as to the details of the commission of the crime.

It was shown by the record that Pinion was available to the State to testify and was in State custody.

Seay testified that "other than what Doug Pinion told" him he knew nothing as to Mr. Park "having any connection with" the money given him by Pinion, and other than that he "had no contact with Mr. Park at all with respect to any killing." Appellant denied any knowledge of the murder, and stated to the jury he had not seen nor talked with Seay for at least two years prior to Hoard's death.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of Federal law, to wit: The application of the Confrontation Clause of the Sixth Amendment to the United States Constitution, in a way in conflict with applicable decisions of this court, or which has not been, but should be, settled by this court.

ARGUMENT

Park stands convicted and condemned on unsworn, uncorroborated, uncross-examined hearsay declarations of witnesses never seen nor heard by the trial jury: witnesses whose truthfulness was never weighed, whose veracity was never shown, whose integrity was never put on the balance and who never were sworn or subjected to the penalties of perjury.

Everything proved by the State could be true and yet petitioner could be innocent. Seay, the only witness offered by the State to connect Park with the crime, did not testify that Pinion's declaration was true, *only that it was said*.

The Confrontation Clause can have no meaning if it can leave a man condemned to a life in prison upon the unsworn out of court utterance of a person whose declaration has not been tested by the effective tool of

cross-examination. The right of a defendant demands it and the mandate of a fair trial needs it.

This is not the case of a mere technical claim that the Confrontation Clause has been violated by the introduction of a bit of evidence merely cumulative in character or impeaching in nature; nor is it the case of a prior confrontation by the witness in another proceeding in the same case.

This is the case, however, where the evidence independent of the declarations is insufficient in law and fact to establish guilt and where the evidence objected to is the sole connecting link between innocence and guilt. This is the case where the accused person has the legitimate right to complain that the Sixth Amendment was adopted to prevent just such miscarriage of justice and that Due Process and the Concept of Ordered Liberty envisioned just such an abuse as was heaped upon him in the trial Court.

1.

The Issue In The Case Was Not Whether Pinion And Worley Had Made The Statements To Seay, But Whether The Statements Were True

The majority opinion of the Court of Appeals misapplied the fundamental reasoning of the Confrontation Clause of the Sixth Amendment by holding that "(t)he issue was whether Pinion and Worley had made the statements." This was most definitely and absolutely *not* the issue. The issue was whether the *facts* stated by Pinion and Worley were *true*. Obviously, if

the facts stated by Pinion and Worley, or the factual conclusions to be drawn therefrom, were false, then petitioner was not a party to the conspiracy to murder Hoard and should not have been convicted.

Judge Wisdom, in a dissent joined by Judges Goldberg, Godbold, Simpson and Roney, very forcefully points this out.

> "The issue was the truth or falsity of their statements. Park was entitled to confront these accusers."

What better tool could ever be given to defense counsel than effective and searching cross-examination of the persons alleged to be the declarants, Pinion and Worley, to ascertain from them if (1) they made such statements, (2) if so, were they true, (3) were they learned by them as a result of mere rumor or guesswork, or (4) were they lying to Seay as an inducement to get him to commit the crime. Whatever the truth was, the jury would have been better equipped to reach a logical verdict after listening to a cross-examination of the declarants themselves, instead of having to determine the truthfulness of the facts by a second-hand listener.

Seay admitted under cross-examination that the only knowledge he had as to petitioner's participation in the murder was what Pinion told him, and that Seay had had no personal contact with the petitioner about the murder. This was as much as cross-examination could accomplish as to Seay.

2.

The Declarations By Pinion And Worley Were Both Crucial And Devastating

The majority opinion of the Court of Appeals reached a determination that the declarations were not crucial and devastating on the theory that the Georgia Supreme Court's holding that since petitioner was shown by other evidence to have been a member of a conspiracy to commit a misdemeanor, (selling tax paid liquor in a dry county), he could have been convicted of murder on that fact alone. This was an erroneous interpretation of the Georgia Supreme Court's decision.

The Georgia Supreme Court required proof of the petitioner's connection with the murder before it sustained a conviction. It held:

> "The evidence relied upon by the State as corroborating the testimony of the accomplice Seay tended to connect Park with the murder and was sufficient to support his conviction." *Park vs. State, 224 Ga. at 477, 162 S.E. 2d 366.*

Judge Thornberry, in a dissent, joined by Judges Wisdom, Goldberg, Godbold, Simpson and Roney, recognized that the Georgia Supreme Court

> "required corroboration of Seay's testimony since he was an accomplice to the murder. * * * If the Georgia opinion required proof of Park's participation in the murder plot, then I feel

this case presents a Confrontation problem significantly different from Dutton. The out of court statements of Pinion and Worley provided the only evidence linking Park to the murder conspiracy. The Georgia Supreme Court's decision there allowed the State to use out of court statements against Park to establish an essential element of its case. Those statements were clearly crucial to the prosecution's case, and Park never had the opportunity to confront and cross-examine the makers of those statements."

In *Evans vs. Dutton, 400 U. S. 74 (91 S. Ct. 210)* relied upon by the majority in the case *sub judice*, an out of court declaration of a co-conspirator was held not to be inadmissible as a Confrontation violation. In so holding, however, this court was careful to point out that the evidence introduced against Evans in the State Court was not "crucial" or "devastating", as in the other cases discussed in the opinion.

In *Douglas vs. Alabama, 380 U. S. 415 (S. Ct.)*, one of the cases cited in *Dutton* as involving cruciality, it was held that the accomplice's reliance upon the privilege against compulsory self-incrimination,

> "created a situation in which the jury might improperly infer both that the statement had been made and that it was true."

This case *sub judice* must be distinguished from *Dutton* because in *Dutton* there was eye witness

testimony introduced against the defendant to the effect that he had committed the crime. Hence the declaration was not "crucial" or "devastating". The contrary is true here.

3.

Dutton vs. Evans Sets Out Three Criteria For Admissibility Of Co-conspirator Declarations Satisfying Confrontation Clause

(a) The declaration must not involve evidence in any sense "crucial" or "devastating";

(b) It must be offered only as proof that it was made, and not as proof that it was true; and

(c) It must be made under such circumstances that has the "indicia of reliability."

(a).

Was The Evidence Admitted Crucial Or Devastating?

In *United States vs. Clayton, (1st Circuit) 450 F. 2d 16*, the Court interpreted *Dutton vs. Evans* to mean that it was

> "strictly limited to the facts of that case, including a finding that the hearsay admitted was in no sense 'crucial' or 'devastating'."

In *Dutton vs. Evans* the Supreme Court was careful to point out that no less than twenty witnesses testified for the prosecution, among which was the witness Truett who, by direct testimony, identified Evans as the person who shot and killed the three victims. The co-conspirator declaration which was admitted in evidence in that case consisted of the post-arrest declaration of Williams to Shaw that "if it hadn't been for that son-of-a-bitch Evans, I wouldn't be in the trouble I am today."

The Supreme Court noted that this declaration "was of peripheral significance at most" and that "its application in the circumstances of this case did not violate the Constitution." The Court further noted that the admission of this declaration did "not involve evidence in any sense 'crucial' or 'devastating'."

In contrast with *Dutton vs. Evans* the case *sub judice* shows that there was no evidence by the State identifying Park as the person who master-minded the murder, no evidence that he was present when the crime was committed, no evidence that he furnished any of the funds, no evidence that he had any knowledge that the crime was being committed or who committed it and no evidence that he had conspired with anyone to commit the crime of murder.

The Pinion declaration to which objection was made was the "missing link" in the case between guilt and innocence. Whether or not the circumstantial evidence introduced by the State would have authorized a jury to conclude the guilt is not relevant here. What is important is the question whether the admission of the

Pinion declaration before the jury might have caused the jury to believe that the scales of justice were then tipped against the defendant to such an extent as to believe him guilty beyond a reasonable doubt. Thus, the Pinion declaration was both "crucial" and "devastating" within the meaning of *Dutton vs. Evans*.

The Pinion declaration was also "crucial" in that without it the State had an extremely doubtful case against the Appellant as a matter of law, and possibly no case against him as a matter of fact.

Surely the State, acting in its capacity as the discoverer of the truth rather than its role as prosecutor, should have been more interested in letting the jury learn from Pinion, the man who made the declaration, what the truth was when he declared to Seay (if he did) that the Old Man won't go up. It can only be presumed that when the State failed and refused to put Pinion on the stand it was well aware that his testimony, or the resultant cross-examination, would react unfavorably to the prosecution's case.

(b).

Pinion Declaration Admissible Only As Proof That It Was Declared Not As Proof Of Its Truthfulness

Assuming but not conceding that the Pinion declaration made to Seay in the formative stages of the conspiracy to murder Floyd Hoard was relevant and admissible under the Georgia Code Section which per-

mits the acts and declarations of conspirators to be admitted as evidence against all the conspirators, its admissibility is limited, both by the Confrontation Clause and the Hearsay Rule, to proof only that the declaration was made; not that it was true in point of fact.

> "Any out-of-Court statement introduced in evidence for the purpose of proving the truth of the matter contained in the statement" is hearsay and inadmissible.
>
> *U. S. vs. Williamson, (5 Cir.) 450 Fed. 2d 585.*
>
> "Words are not hearsay unless they constitute statements, and out-of-Court statements are themselves not hearsay unless they are introduced for the purpose of proving facts contained in, or asserted by, those statements." id.

It is the contention of the State that Pinion was the agent of Park, and that as such agent his acts, conduct and declarations were admissible against Park. It has offered the Pinion declaration, not as proof that the communication by Pinion to Seay constituted the contract, and thus put Seay on notice as to what he was obligated to do, *but as original evidence against Park* that what Pinion uttered *was in fact true*. This is precisely what the State cannot lawfully do without running counter to the Hearsay Rule and the Confrontation Clause. See: *Blight vs. Ashley, 1 Pet. C. C. 15. 21: State vs. Wentworth, 37 New Hampshire 217; Smith vs. Whittier, 95 Cal. 279 (30 Pac. 529); Murray vs. United States, 10 F. 2d 409; Busby vs. United States, 296 F. 2d 328 (7,; 22-A C.J.S. (Criminal Law) p. 994.*

In *Dutton vs. Evans, 400 U. S. 74*, this Court clearly recognized that Evans was not deprived of his Confrontation right on the issue of whether "Williams actually made the statement". This Court went on to hold that if the declaration of the conspirator had "been used to prove merely that the statement had been made" that neither a hearsay nor a confrontation question would have arisen. (p. 89).

However, the distinction between *Dutton vs. Evans* and the case now before this Court becomes apparent. In *Dutton* the State proved by direct testimony that Evans killed three police officers. The declaration by Williams made to Shaw did not assert a specific fact attempting to relate the contents of a conversation by Evans. The *fact* of Williams having made the statement was proved by the person who overheard it. Cross-examination of Williams *as to the fact of whether he made the statement* would have elicited no more light on this issue than did the cross-examination of Shaw, the person to whom it was related.

In the case now before the Court the State failed as a matter of law and fact to prove that Park had knowledge that a conspiracy was in progress between Pinion and Seay to murder Floyd Hoard. It set about this task by attempting to show the Pinion declaration as proof, not that he made the declaration, but that the contents of the declaration were true.

(c).

The Declarations Introduced By The State Did Not Carry The "Indicia Of Reliability" Required By Law And Thus Violated The Confrontation Clause

We must test the Pinion declaration to determine whether the circumstances under which it was made met the required legal test of reliability.

Pinion had previously approached Seay making a preliminary offer. Seay did not accept, but left the matter open. Later Seay made further contact with Pinion at which time the bargaining as to price was being negotiated. Pinion, attempting to get the best possible price, told Seay to wait, declaring that he had to see the "*old man*". Upon the return of Pinion he again made his offer to Seay.

There was nothing in this pre-bargaining stage which would suggest that Pinion's declaration involving the "old man" bore any resemblance to reliability. It was not a declaration against the penal interest of Pinion. On the contrary, the name dropping of the "old man" appears to have been made with an apparent attempt to bring in Park as a party to the transaction in order to convince Seay that he ought to accept the proposition at a lower figure.

Judge Smith, District Court Judge, in his opinion, as to the admission of this declaration cites 85 Harvard Law Review, 1378, the Confrontation Clause and the

Co-Conspirator excepted in Criminal Prosecutions, by Davenport. Mr. Davenport equates the *Dutton vs. Evans* rule with the reliability analysis of the standard co-conspiracy exception. An example is given beginning on page 1387 of an alleged attempt by a declarant A to bribe L, a State legislator.

> "At the trial of B, a local political boss and an alleged co-conspirator with A, the prosecution tries to introduce the testimony of L's legislative assistant that A approached him, mentioned that he and B hoped to persuade L to vote proposition PU, and asked the assistant to find out whether L would be interested in a $10,000.00 campaign contribution."

The author then notes that the declaration is quite unreliable.

The author bases his conclusion on many different reasons. He says it "may suffer from ambiguity" in that cross-examination of A might show either that he had not meant to connect B with the bribe attempt or that no bribe had been intended. The analogy is the same in the case at bar. The Pinion declaration likewise suffers from ambiguity. Cross-examination of Pinion might have shown either that he was intending to borrow the money from Park, or that Park had no knowledge of the crime. Cross-examination of Pinion might have shown that when he made the declaration to Seay he thought Park might want to participate by furnishing a portion of the fund with which to commit the murder, and that when he approached Park he learned Park had no desire to become a party thereto, and that when he returned to

Seay he concealed the fact from him that Park wanted nothing to do with the murder.

These and many other items could have been covered by a cross-examination of Pinion. Seay, no matter how long he was cross-examined, would have been unable to answer these questions.

Mr. Davenport, in the same Harvard Law Review, indicates that

> "A declaration ostensibly against the declarant's penal interest is inadmissible to the extent it implicates someone other than the declarant in the criminal enterprise."

He further explains this statement with the logical reasons that:

> "The naming of another as a compatriot will almost never be against the declarant's own interest and thus will contain little assurance of reliability on this ground."

Also:

> "The invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes (another kind of advantage), or may represent an effort to gain some personal revenge."

On the question of devastation the Author notes that:

> "these personal invocations should be excluded where they directly and specifically implicate the defendant. Such direct personal references are generally *far too devastating to be treated* lightly. They bear directly on the question of the defendant's guilt as an individual and will usually weigh heavily in the minds of the jurors."

Petitioner refers the Court to a complete reading of this Law Review by Mr. Davenport inasmuch as it was referred to in Judge Smith's order denying the habeas corpus.

The declaration of Pinion to Seay did not contain any of the *indicia of reliability* with which to dispense with his own testimony, subject to cross-examination and its admission, under the circumstances of this case, violated the appellant's confrontation rights.

4.

Burden Of Producing Witness On Prosecution

1. The burden of producing a witness is on the prosecution.

Simmons vs. U.S., 440 F. 2d 890.

2. The State must make a good faith showing that witness is unavailable to testify before offering secondary evidence.

Berger vs. California, 393 U. S. 314.

3. Defense counsel would have lost the closing argument to the jury under Georgia law which gives him the closing argument where no evidence is introduced.

Park vs. State, 224 Ga. 467.

4. If the defendant called Pinion as a witness, he would not have been able to cross-examine him if his testimony was unfavorable, and would have been bound by his testimony.

5. If Pinion testified that he had no such conversation with Seay relating to the murder, the State would have had the right to prove the declaration by Seay in rebuttal to Pinion's testimony, and such factual issue would have precluded the defendant from asserting his Sixth Amendment right.

CONCLUSION

The certiorari should be granted, and the judgment of the United States Court of Appeals for the Fifth Circuit should be Reversed.

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461-4878

CERTIFICATE OF SERVICE

I, Wesley R. Asinof, of counsel for petitioner in certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have on this day served a copy of the foregoing petition for the writ of certiorari upon counsel for defendant in certiorari in the following manner:

By depositing in the United States Mail a copy of said petition and addressed to the following persons:

Honorable Nat Hancock, District Attorney, Jackson County Courthouse, Jefferson, Georgia,

Honorable Arthur Bolton, Attorney General, c/o State Capitol, Atlanta, Georgia 30334

I further certify that sufficient postage has been attached thereon to insure delivery by first class mail and that said recipients are less than five hundred miles from the place of mailing.

This ___ day of April, 1975.

Wesley R. Asinof
Attorney for Petitioner